

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between the following groups of Petitioners:

(1) the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (collectively “State Petitioners”); and (2) Natural Resources Defense Council (NRDC), Sierra Club, and Environmental Defense Fund (EDF) (collectively “Environmental Petitioners”), and Respondent, the U.S. Environmental Protection Agency (“EPA”) (collectively “the Parties”).

WHEREAS, EPA published a final action entitled “Standards of Performance for Electric Utility Steam Generating Units, Industrial-Commercial-Institutional Steam Generating Units, and Small Industrial-Commercial-Institutional Steam Generating Units,” 71 Fed. Reg. 9,866 (Feb. 27, 2006) (the “Final Rule”);

WHEREAS, the Final Rule included amendments to the standards of performance for electric utility steam generating units subject to 40 C.F.R. part 60, subpart Da (“EGUs”);

WHEREAS, in connection with this Final Rule, EPA declined to establish standards of performance for greenhouse gas (“GHG”) emissions;

WHEREAS, State and Environmental Petitioners filed petitions for judicial review of the Final Rule under the Clean Air Act (“CAA”) Section 111, 42 U.S.C. § 7411, contending, *inter alia*, that the Final Rule was required to include standards of performance for GHG emissions from EGUs;

WHEREAS, the portions of State and Environmental Petitioners’ petitions for review of the Final Rule that related to GHG emissions were severed from other petitions for review of the Final Rule, and were formerly pending before the United States Court of Appeals for the District

of Columbia Circuit (the “Court”) under the caption *State of New York, et al. v. EPA*, No. 06-1322;

WHEREAS, following the Supreme Court’s decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA requested remand of the Final Rule to EPA for further consideration of the issues related to GHG emissions in light of that decision;

WHEREAS, the Court remanded the Final Rule to EPA for further proceedings on GHG emissions in light of *Massachusetts v. EPA*, by its Order of September 24, 2007 (the “Remand Order”);

WHEREAS, as of the date of this Settlement Agreement, EPA has not taken any publicly noticed action to respond to the Remand Order;

WHEREAS, the State Petitioners submitted letters to EPA dated June 16, 2008 and August 4, 2009 inquiring as to the status of EPA’s action on the remand and stating their position that EPA had a legal obligation to act promptly to comply with the requirements of Section 111, and Environmental Petitioners submitted a letter to EPA on August 20, 2010 seeking commitments to rulemaking on GHG emissions from EGUs as a means of avoiding further litigation;

WHEREAS, EGUs are, collectively, the largest source category of GHG emissions in the United States, according to a recent EPA analysis. *See* 74 Fed. Reg. 56,260, 56,363 (Oct. 30, 2009);

WHEREAS, EPA’s initial evaluation of available GHG control strategies indicates that there are cost-effective control strategies for reducing GHGs from EGUs;

WHEREAS, EPA believes it would be appropriate for it to concurrently propose performance standards for GHG emissions from new and modified EGUs under CAA section

111(b), 42 U.S.C. § 7411(b), and emissions guidelines for GHG emissions from existing affected EGUs pursuant to CAA section 111(d), 42 U.S.C. § 7411(d), and 40 C.F.R. § 60.22;

WHEREAS, the Parties wish to enter into this Settlement Agreement to resolve the State and Environmental Petitioners' request for performance standards and emission guidelines for GHG emissions under CAA sections 111(b) and 111(d) and to avoid further litigation on this issue, without any admission or adjudications of fact or law;

NOW THEREFORE, the Parties, intending to be bound by this Settlement Agreement, hereby stipulate and agree as follows:

1. EPA will sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(b) that includes standards of performance for GHGs for new and modified EGUs that are subject to 40 C.F.R. part 60, subpart Da. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
2. EPA will also sign by July 26, 2011, and will transmit to the Office of the Federal Register within five business days, a proposed rule under section 111(d) that includes emissions guidelines for GHGs from existing EGUs that would have been subject to 40 C.F.R. part 60, subpart Da if they were new sources. EPA shall provide the State and Environmental Petitioners a copy of the proposed rule within five business days of signature.
3. After considering any public comments received concerning the proposed rule described in Paragraph 1, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule described in Paragraph 1. EPA shall provide the

Environmental and State Petitioners with a copy of its final action within five business days of signature.

4. If EPA finalizes standards of performance for GHGs pursuant to Paragraph 3, then based on consideration of the public comments received concerning the proposed rule described in Paragraph 2, EPA will sign no later than May 26, 2012, and will transmit to the Office of the Federal Register within five business days, a final rule that takes final action with respect to the proposed rule describe in Paragraph 2. EPA shall provide the State and Environmental Petitioners with a copy of its final action within five business days of signature.
5. EPA agrees that it will make staff available by telephone at least every 60 days to update State and Environmental Petitioners on EPA's progress in completing the actions described in Paragraphs (1) through (4). In addition, EPA will provide State and Environmental Petitioners with a status letter every 60 days, which shall include an affirmative statement of whether EPA believes it will timely complete all actions described in Paragraphs 1 through 4.
6. Upon EPA's fulfillment of each of the obligations stated in Paragraphs 1 through 4 above, this Settlement Agreement shall constitute a full and final release of any claims that State and Environmental Petitioners may have under any provision of law to compel EPA to respond to the Court's Remand Order with respect to GHG emissions from EGUs.
7. State and Environmental Petitioners shall not file any motion or petition seeking to compel EPA action in response to the Remand Order with respect to GHG emissions from EGUs unless EPA has first failed to meet an obligation stated in Paragraphs 1

through 4 above. If EPA fails to meet such an obligation, or if an EPA status letter described in Paragraph 5 does not affirm that EPA believes it will timely complete all actions described in Paragraphs 1 through 4, or if EPA fails to send a status letter as described in Paragraph 5 and does not promptly cure that failure upon receiving notice, State and Environmental Petitioners' sole remedy shall be to file an appropriate motion or petition with the Court or other civil action seeking to compel EPA to take action responding to the Remand Order. In that event, all Parties reserve any claims or defenses they may have in such an action, and the dates stated in Paragraphs 1 through 4 shall be construed to represent only the parties' attempt to compromise claims in litigation, and not to represent agreement that any particular schedule for further agency action is reasonable or otherwise required by law. State and Environmental Petitioners reserve all rights under the law to file petitions for review of final agency actions under this Settlement Agreement, pursuant to section 307(b), 42 U.S.C. § 7607(b).


8. This Settlement Agreement constitutes the sole and entire understanding of EPA and the Environmental and State Petitioners and no statement, promise or inducement made by any Party to this Settlement Agreement, or any agent of such Parties, that is not set forth in this Settlement Agreement shall be valid or binding.
9. Except as expressly provided in this Settlement Agreement, none of the Parties waives or relinquishes any legal rights, claims or defenses it may have. State and Environmental Petitioners reserve the right to seek attorneys' fees and costs relating to this litigation, and EPA reserves any defenses it may have relating to such claims.
10. The provisions of this Settlement Agreement can be modified at any time by written mutual consent of the Parties.

11. Except as expressly provided herein, nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by the CAA or by general principles of administrative law.
12. The commitments by EPA in this Settlement Agreement are subject to the availability of appropriated funds. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate, expend or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. 1341, or any other applicable appropriations law or regulation, or otherwise take any action in contravention of those laws or regulations.
13. Nothing in the terms of this Settlement Agreement shall be construed to limit EPA's authority to alter, amend or revise any final rule EPA may issue pursuant to Paragraphs 3 or 4, or to promulgate superseding regulations.
14. The Parties agree and acknowledge that before this Settlement Agreement is final, EPA must provide notice in the Federal Register and an opportunity for public comment pursuant to CAA Section 113(g), 42 U.S.C. 7413(g). After this Settlement Agreement has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold her/his consent to the Settlement Agreement, in accordance with section 113(g) of the CAA. Within 30 days of the close of the public comment period, EPA shall provide written notice to State and Environmental Petitioners of any decision to withdraw or withhold consent or shall provide written notice of finality. This Settlement Agreement shall become final on the

date that EPA provides written notice of such finality to the State and Environmental Petitioners.

15. The undersigned representatives of each Party certify that they are fully authorized by the Party that they represent to bind that respective Party to the terms of this Settlement Agreement. This Settlement Agreement will be deemed to be executed when it has been signed by the representatives of the Parties set forth below, subject to final approvals pursuant to Paragraph 14.

DATE: 12/21/10

  
\_\_\_\_\_  
DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

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DAVID GUNTER  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986

*Counsel for U.S. Environmental Protection Agency*

DATE: 12/16/2010

\_\_\_\_\_  
  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*



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U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section  
P.O. Box 23986  
Washington, D.C. 20026-3986


*Counsel for U.S. Environmental Protection Agency*

DATE: \_\_\_\_\_

\_\_\_\_\_  
MICHAEL J. MYERS  
MORGAN A. COSTELLO  
Assistant Attorneys General  
Environmental Protection Bureau  
Office of the Attorney General, The Capitol  
Albany, New York 12224

*Counsel for State of New York*

DATE: 12/8/10

  
\_\_\_\_\_  
KENNETH P. ALEX  
SUSAN DURBIN  
Office of the Attorney General, State of California  
1515 Clay Street, 20th Floor, P.O. Box 70550  
Oakland, CA 94612

*Counsel for State of California*

DATE: \_\_\_\_\_



KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508


*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: 12/15/2010

  
VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

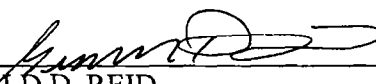
*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

*Counsel for State of Delaware*

DATE: 12/8/10

  
GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: \_\_\_\_\_

SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: \_\_\_\_\_

KIMBERLY MASSICOTTE  
MATTHEW I. LEVINE  
Assistant Attorneys General  
Office of the Attorney General  
P.O. Box 120, 55 Elm Street  
Hartford, Connecticut 06141-0120

*Counsel for State of Connecticut*

DATE: \_\_\_\_\_

VALERIE M. SATTERFIELD  
Deputy Attorney General  
Department of Justice  
102 W. Water Street  
Dover, DE 19904

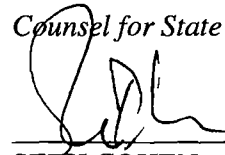
*Counsel for State of Delaware*

DATE: \_\_\_\_\_

GERALD D. REID  
Assistant Attorney General  
Department of the Attorney General  
State House Station #6  
Augusta, Maine 04333-0006

*Counsel for State of Maine*

DATE: 12/8/2010



SETH COHEN  
STEPHEN R. FARRIS  
JUDITH ANN MOORE  
Assistant Attorneys General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504-1508

*Counsel for State of New Mexico*

DATE: 12/14/2010



PAUL S. LOGAN  
Assistant Attorney General  
Department of Justice  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Special Assistant Attorneys General  
Rhode Island Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

THEA J. SCHWARTZ  
Assistant Attorney General  
Environmental Division  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

\_\_\_\_\_  
PAUL S. LOGAN  
Assistant Attorney General  
Department of Justice  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: 12/13/2010

\_\_\_\_\_  
GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Special Assistant Attorneys General  
Rhode Island Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

\_\_\_\_\_  
THEA J. SCHWARTZ  
Assistant Attorney General  
Environmental Division  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

\_\_\_\_\_  
LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE: \_\_\_\_\_

PAUL S. LOGAN  
Assistant Attorney General  
Department of Justice  
1162 Court Street, N.E.  
Salem, Oregon 97301


*Counsel for State of Oregon*

DATE: \_\_\_\_\_

GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Special Assistant Attorneys General  
Rhode Island Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

*Counsel for State of Rhode Island*

DATE: 12/10/10

  
THEA J. SCHWARTZ  
Assistant Attorney General  
Environmental Division  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*

DATE: \_\_\_\_\_

LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*



DATE: \_\_\_\_\_

\_\_\_\_\_  
PAUL S. LOGAN  
Assistant Attorney General  
Department of Justice  
1162 Court Street, N.E.  
Salem, Oregon 97301

*Counsel for State of Oregon*

DATE: \_\_\_\_\_

\_\_\_\_\_  
GREGORY S. SCHULTZ  
MICHAEL RUBIN  
Special Assistant Attorneys General  
Rhode Island Department of the Attorney General  
150 South Main Street  
Providence, Rhode Island 02903


*Counsel for State of Rhode Island*

DATE: \_\_\_\_\_

\_\_\_\_\_  
THEA J. SCHWARTZ  
Assistant Attorney General  
Environmental Division  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001

*Counsel for State of Vermont*


DATE: 12-10-10

  
\_\_\_\_\_  
LESLIE R. SEFFERN  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504

*Counsel for State of Washington*

DATE:

*September 14, 2010*

  
DONNA M. MURASKY

Deputy Solicitor General

Office of the D.C. Attorney General

441 Fourth Street, N.W.

Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: \_\_\_\_\_

\_\_\_\_\_  
WILLIAM L. PARDEE

Assistant Attorney General

Environmental Protection Division

One Ashburton Place

Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING

New York City Law Department

100 Church Street

New York, NY 10007

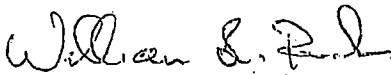
*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
Deputy Solicitor General  
Office of the D.C. Attorney General  
441 Fourth Street, N.W.  
Washington, D.C. 20001

*Counsel for District of Columbia*

DATE: Dec 8, 2010

\_\_\_\_\_  
  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: \_\_\_\_\_

\_\_\_\_\_  
CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*

DATE: \_\_\_\_\_

\_\_\_\_\_  
DONNA M. MURASKY  
Deputy Solicitor General  
Office of the D.C. Attorney General  
441 Fourth Street, N.W.  
Washington, D.C. 20001

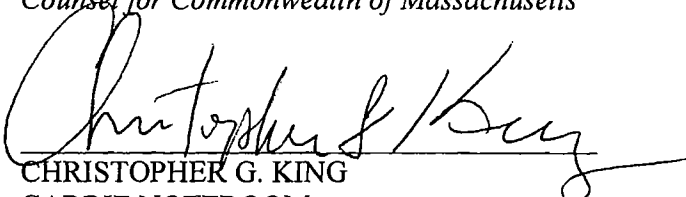
*Counsel for District of Columbia*

DATE: \_\_\_\_\_

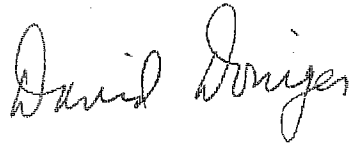
\_\_\_\_\_  
WILLIAM L. PARDEE  
CAROL IANCU  
Assistant Attorneys General  
Environmental Protection Division  
Office of the Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108

*Counsel for Commonwealth of Massachusetts*

DATE: 12.10.10

  
\_\_\_\_\_  
CHRISTOPHER G. KING  
CARRIE NOTEBOOM  
New York City Law Department  
100 Church Street  
New York, NY 10007

*Counsel for City of New York*



DATE: 12/16/2010

---

DAVID D. DONIGER  
Natural Resources Defense Council  
1200 New York Avenue NW, Suite 400  
Washington, DC 20005

*Counsel for Natural Resources Defense Council*



DATE: 12/16/2010

---

JOANNE SPALDING  
Sierra Club  
85 Second Street  
San Francisco, CA 94105

*Counsel for Sierra Club*



DATE: 12/20/2010

---

VICKIE PATTON  
Environmental Defense Fund  
2334 N. Broadway  
Boulder, CO 80304

*Counsel for Environmental Defense Fund*